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Supreme Court, U.S.
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No. 00-824

In The

Supreme Court of the United States

SYLVESTER PALMER,

Petitioner,

v.

TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA (TMSEL); REGIONAL TRANSIT AUTHORITY; AMALGAMATED TRANSIT UNION, Division 1611; UNIDENTIFIED PARTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Appeals for the Fifth Circuit, Docket No. 00-30184, which summarily affirmed the District Court's Judgment, and the Opinion of United States Magistrate Judge Alma L. Chasez, Docket No. 98-0594. The Opinion of the Court of Appeals for the Fifth Circuit is reproduced commencing at page 1a of the Petition and is herein referred to as the Court of Appeals Opinion or Decision. The Opinion of United States Magistrate Judge Alma L. Chasez is reproduced commencing at page 7a of the Petition and is herein referred to as the District Court's Opinion or Decision.

STATEMENT OF JURISDICTION

The Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. §1254 or Supreme Court Rule 10 (a) or (c) because there is neither an important federal question involved nor does the Court of Appeals' opinion or that of the District Court conflict with any decision of this Court. Moreover, the Petition consists of alleged factual errors, which, under the Court's own Rule 10, rarely support the granting of a petition of writ of certiorari.

STATEMENT OF THE CASE

In July of 1978, the petitioner was hired by New Orleans Public Service, Inc. ("NOPSI") in the capacity of operator (bus driver), a union position. Five years later, NOPSI was acquired by the Regional Transit Authority ("RTA"). Petitioner continued to work as an operator for Transit Management of Southeast Louisiana ("TMSEL") in service to the RTA. By 1995, the petitioner had worked

himself up to the position of instructor within the Transportation Department, another union position. On October 6, 1995, the petitioner was transferred from the instructor position to the position of assignment supervisor in the Maintenance Department, a non-union position. Along with the petitioner, three male instructors and one female run dispatcher, Dale Newman, were also reassigned to the Maintenance Department. On October 13, 1995, the petitioner filed an internal grievance wherein he complained that his lateral transfer had operated to deprive him of the benefit of seniority in the selection of work schedules and vacation time.[1]

Thereafter, the petitioner alleged that he received constant shift changes, cancellation of vacation days, and substandard evaluations.[2] In December of 1995, Newman was transferred back to the Transportation Department to the position of run dispatcher, a job she had previously held, at no change in salary. The following month, Francis Bowie, a female, was transferred to the Maintenance Department as assignment supervisor. The petitioner alleged that Bowie, too, received preferential treatment in the selection of work schedules, training, and vacation time. On December 30, 1996, Bowie was transferred to the

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[1] The substance of the petitioner's grievance, as reflected on the form that he completed for that purpose, was that shift schedules and vacation time were determined alphabetically subsequent to his transfer to the Maintenance Department, contrary to being determined on the basis of seniority. Although not specifically mentioned in the written grievance form, the petitioner also alleged that his "seniority" rights were violated because Newman received better shift assignments and vacation schedules following their reassignment to the Maintenance Department.

[2] The petitioner made no allegation that these occurrences resulted in a change of his job duties or loss of pay.

Para-Transit Department as a senior run dispatcher with no change in salary.

Subsequently, on March 31, 1997, the petitioner, along with twenty female employees and eight other male employees, was terminated as a result of a reduction in force ("RIF"). On June 9, 1997, the petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The standardized charge form signed by the petitioner indicates that the alleged discrimination was based on gender alone and that the acts involved occurred between January 1, 1997 and March 31, 1997.[3]

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS.

This Court does not review decisions of a United States Court of Appeals unless an important federal question has been decided in conflict with another United States Court of Appeals or state court of last resort or this Honorable Court. 28 U.S.C. §1254(1); S. Ct. R. 10(a) and (c). *See Braxton v. United States*, 500 U.S. 344, 347 (1991). Moreover, a "petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. In light of this, the Court will only grant review where there are "special and important reasons" to do so. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

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[3] Notwithstanding the allegations contained within the charge of discrimination, the petitioner testified at his deposition that gender discrimination played no part in the RIF.

The petitioner, however, did not – because he could not – assert in his Petition any "compelling," "special," or "important" reason regarding why this Court should grant review of this matter. *See* S. Ct. R. 10; *Rice*, 349 U.S. at 74. He did not – because he could not – invoke any of the grounds this Court takes into account in deciding whether to grant review. *See* S. Ct. R. 10(b) and (c). Rather, the petitioner's entire Petition focused on his contention that neither the federal district court nor the Fifth Circuit properly considered the *facts*. But the truly significant fact is that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. R. 10.

There is no jurisdictional basis, and none has been invoked, which supports the petitioner's writ and which, therefore, allows this Court to grant review. The petitioner **has not cited – nor could he cite** – any important questions of federal law in this matter that are decided differently among the Courts of Appeals, by a state court of last resort, or any decision in conflict with precedent of this Court. The district court and the Fifth Circuit properly decided this case, and the petitioner's writ should be denied.

II.

THE PETITIONER HAS MADE MISREPRESENTATIONS IN HIS PETITION AND OFFERED NEW THEORIES AND FACTS TO THIS COURT BEYOND THE RECORD.

On summary judgment, this Court may examine the record *de novo*. *United States v. Winstar Corp.*, 518 U.S. 839, 860 (1996); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 (1992). However, it must limit its review

to those facts, exhibits, theories, depositions, and affidavits that were before the district court when it entered summary judgment for TMSEL. To be sure, the petitioner cannot now – for the first time before this Court – allege "new" facts and issues beyond the record to secure a reversal and remand of this matter. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (5th Cir. 1995); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir. 1988); *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983); *Ramsey v. United States*, 463 F.2d 815 (D.C. Cir. 1972), *cert. denied*, 421 U.S. 913 (1975); and *Crompton-Richmond Co. v. Smith*, 392 F.2d 577 (3d Cir. 1967). *See also* C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure: Civil 2d* §2716 (1998). **Significantly, the circuits are uniform on this issue.**

Nonetheless, that is exactly what the petitioner has done: he has conjured up new facts and theories before this Court that were never alleged below. In accordance with Supreme Court Rules. *See* S. Ct. R. 15.2. TMSEL is obligated to point out the following misstatements of law and fact:

1. The petitioner has now alleged for the first time before this Court that TMSEL violated his employment contract by denying him seniority rights. *See* Petition at p. 11. In the lower courts, however, he claimed that his *lay-off* in 1997 violated his contract. The Court should not allow the petitioner to secure a reversal based upon this "new" theory of contract.
2. The Petition states, "TMSEL does not dispute that Palmer, an employee of 19 years, enjoyed seniority rights. . . . " *Ibid.* at p. 10. To the contrary, TMSEL submitted undisputed evidence to the district court, through the affidavit of union president Robert L.

Spencer, that the petitioner was not a member of the union, and thus, did not "enjoy seniority rights" as now claimed by the Petition.

3. The Petition states, "TMSEL could not dispute Palmer's seniority rights because these rights were protected by Louisiana Revised Statute 23:890 and by Palmer's employment contract." *Ibid.* at p. 10. As an at-will, non-union employee, petitioner's "seniority rights" were protected neither by that statute nor by any purported employment contract.

4. The Petition states, "TMSEL's *sole* argument in support of summary judgment dismissal of Palmer's breach of contract claim is that Palmer was an 'at-will' employee." *Ibid.* at pp. 10-11. This is yet another mischaracterization. It was not until *after* the Motion for Summary Judgment had been filed that the petitioner ever pled or even mentioned that he was allegedly protected by the 13(c) agreement. The petitioner first raised the issue of 13(c) in his Opposition to Motion, and then TMSEL refuted his position in its Reply Memorandum. Thus, for the petitioner to now assert that TMSEL's *sole* basis for summary judgment on the contract claim was that the petitioner was an "at-will" employee is not correct.

5. The petitioner stated that "TMSEL did not dispute the fact that Palmer was . . . denied promotions back to the union position that he held for five years. . . . " *See* Petition at p. 17. TMSEL did, in fact, deny that the petitioner was denied promotions and

proved that the "promotions" that the Petition referenced were, in fact, transfers, which are not adverse employment actions under Title VII.

6. The Petition states, "TMSEL does not dispute that Palmer was contractually entitled to preferences based on seniority, including most importantly preferences in promotions and rehiring." *Ibid.* TMSEL has clearly disputed the fact that the petitioner was contractually entitled to preferences based on seniority. TMSEL denied the fact that the petitioner had been denied promotions and made clear that the petitioner had the opportunity to be considered for rehire, but *never* went to apply for such positions.

7. The Petition urged that "TMSEL acknowledges that Bowie and Newman, two females with less seniority than Palmer, were transferred back to the Transportation Department." *Ibid.* at p. 17. Whether Bowie and Newman had less seniority than petitioner was not in the record for TMSEL to dispute and not an issue brought before the District Court.

8. The Petition states, "TMSEL does not dispute the fact that . . . if Palmer had been given an equal opportunity to transfer back to a union position in the Transportation Department, he would have been secure from the 1997 layoff. . . . " *Ibid.* TMSEL certainly has always pled that petitioner was given an "equal opportunity" while employed by TMSEL. Furthermore, there is nothing in the record that proves that members of the union were not laid off in the 1997 RIF.

9. The Petition states, "TMSEL does not dispute the fact that because Bowie and Newman were transferred back to the Transportation Department, they were not laid off." There is nothing in the record to show that Bowie and Newman were transferred to allegedly protected union positions or that they have not been laid off by TMSEL.

Regarding his various claims, the petitioner has attempted to create legal and factual controversies before this Court by alleging "new" facts and theories (not raised in the district court); this is clearly not allowed. The law is clear that this Court's review is limited to the record before the district court when it entered summary judgment for TMSEL. This Court cannot now consider issues **beyond the record.**

III.

THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S CASE WAS CORRECT.

A. The District Court Did Not Err When It Dismissed Petitioner's Breach of Contract Claims.

For the first time *ever*, the petitioner now argues that the District Court ignored uncontested facts showing that TMSEL violated his contractually protected seniority rights by denying petitioner the opportunity to transfer to the Transportation Department.

If the petitioner had been a member of the union, he may have had a valid complaint through the union arbitration process or the National Labor Relations Act;[4] however, petitioner **WAS NOT A MEMBER OF THE**

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[4] The petitioner has never filed a charge with the National Labor Relations Board.

UNION when the events he is complaining of occurred. Moreover, under Louisiana law, unless an employee is contractually obligated to be employed for a fixed term, the employee is considered "at-will." As explained more fully below, none of the documents referenced by the Petitioner altered his status as an at-will employee, and TMSEL had no legal obligation to transfer the petitioner because of his seniority rights or otherwise.

1. Palmer Was Not a Member of the Union and Thus Was an At-Will Employee and Did Not "Enjoy" Seniority Rights.

Presumably, when the Petition states that the petitioner has "seniority rights," it means that he was entitled to these rights by virtue of his membership in the union. Nevertheless, it is an uncontested fact that at the time petitioner requested the transfers and at the time he was RIF'd, he was not a member of the union and was an at-will employee.

TMSEL submitted to the district court an affidavit of the union president which unequivocally established that as an assignment supervisor, the petitioner did not hold a position covered by the union's collective bargaining agreement (CBA) with TMSEL. Moreover, petitioner never contested this fact to the district court. Therefore, the district court's determination that petitioner was an at-will employee and not a member of the union at the time of the RIF was not erroneous. This Court, therefore, has no basis whatsoever for questioning the validity of the Summary Judgment granted.

2. Because Petitioner Was an At-Will Employee and Not a Member of the Union, the District Court's Decision to Dismiss His Breach of Contract Claim Was Correct Under Louisiana Law.

Louisiana law provides that when a person is employed for an indefinite period of time, he is considered an at-will employee. *Brannan v. Wyeth Labs., Inc.*, 526 So. 2d 1101, 1104 (La. 1988). An employee not hired for a fixed term may be terminated without cause at any time and that "[a]bsent a specific contract or agreement establishing a fixed term of employment, an employer is at liberty to dismiss an employee at any time for any reason without incurring liability for the discharge." *Thebner v. Xerox Corp.*, 480 So. 2d 454, 457 (La. 3rd Ct. App. 1985); *Leger v. Tyson Foods, Inc.*, 670 So. 2d 397 (La. 3rd Ct. App. 1996); and *Keller v. Sisters of Charity*, 597 So. 2d 1113 (La. 2nd Ct. App. 1992). *See also Williams v. Touro Infirmary*, 578 So. 2d 1006 (La. 4th Ct. App. 1991); *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481, 482 (La. 4th Ct. App. 1988); and *Gil v. Metal Service Corp.*, 412 So. 2d 706, 707 (La. 4th Ct. App. 1982).

The petitioner contended that TMSEL was contractually obligated to transfer him to a union position under the following documents: 1) the CBA between TMSEL and ATU Local No. 1611; 2) the 13(c) agreement; 3) the TMSEL employee handbook; 4) a letter from Leroy Bailey, General Manager to Robert Spencer, President ATU Local Union 1611, dated October 3, 1995; and 5) statements from union representatives. None of these documents or statements provide for a fixed term of employment for the Petitioner, nor has he alleged that he was employed for a fixed term.

Personnel policy manuals do not constitute binding employment contracts. *Thebner*, 480 So. 2d at 457. *See also Schwarz v. Administrators of the Tulane Educ. Fund*, 699 So. 2d 895 (La. 4th Ct. App. 1997); *Keller*, 597 So. 2d at 1113-15. In fact, there is "no Louisiana jurisprudence in which an employee manual has been held to confer *any* contractual rights upon an employee or to create *any* exception to the employment-at-will doctrine." *Leger*, 670 So. 2d at 402.

Since the petitioner was not employed for a fixed term, he was an at-will employee and did not enjoy any contractual right to any special status regarding seniority rights.

3. Louisiana Revised Statute 23:890(c) and the 13(c) Agreement Between NOPSI and TMSEL Did Not "Protect" the Petitioner's Seniority Rights.

The petitioner argues that his "seniority rights" were "protected" based upon selected sections of La. Rev. Stat. 23:890. When this statute is viewed in its entirety, however, it is clear that §890 was promulgated in conjunction with the Urban Mass Transportation Act (UMTA) and was only intended to cover employees who are members of a union. *See* 49 U.S.C. §5333 (formerly §1609).

In an effort to protect the collective bargaining rights of transit workers, Congress created the UMTA. *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). Section 13(c) of the UMTA mandates that a local government like the City of New Orleans make arrangements to preserve transit workers' existing collective bargaining rights before it may receive federal financial assistance to acquire a privately owned transit company. *Id.* at 16; 49 U.S.C. §5333.

Section 890 was enacted the same year as the UMTA and was intended to be a companion statute to UMTA. The only federal court previously to address §890 was the Eastern District of Louisiana in an unpublished opinion, *Burch v. Reese,* No. 88-5191, 1990 U.S. Dist. LEXIS 3112 (E.D. La. 1990). In that decision, the district court determined that both the Louisiana and federal statutes are meant simply to require municipalities to honor CBAs negotiated between employees and their private employers, when those municipalities acquire a transit system. *Id.* The federal statute conditions federal funding on honoring the CBAs, while the state statute simply requires honoring the agreement. *Id.*

The only state case to address §890 recognized that it authorized "municipalities, transit authorities or other authorities to recognize collective bargaining agents of operating and other transit personnel and to enter into contract with such representatives. . . . " *Town of New Roads v. Dukes,* 312 So. 2d 890, 894 n.1 (La. App. 1st Cir. 1975), *rev'd on other grounds, Davis v. Henry,* 555 So. 2d 457 (La. 1990). Because §890 and 13(c) are companion statutes, they will be addressed together concerning petitioner's argument.

Petitioner's reliance on the 13(c) agreement and §890 is flawed for these reasons: 1) because he was not a member of the union, the petitioner was not a covered employee under the 13(c) agreement; 2) even if it is assumed that the petitioner was covered by the 13(c) agreement, the terms of the agreement do not prevent him from being discharged; and 3) even if it is assumed that the petitioner was covered by the 13(c) agreement, he failed to exhaust his administrative remedies.

a. The petitioner was not a "covered employee" under the 13(c) agreement.

Petitioner was not a "covered employee" under either the provisions of the 13(c) agreement itself or those of §890. In *Burch*, the Court determined that 13(c) agreements apply only to union members at the time of the alleged breach. The plaintiffs sued TMSEL on an alleged breach of **the same 13(c) agreement** that is at issue in this matter. Since none of the plaintiffs was affiliated with the union at the time of termination, the 13(c) agreement cause of action was dismissed. *Burch*, 1990 U.S. Dist. LEXIS 3112, at *12.

In *United Transp. Union v. Brock*, the D.C. Circuit held that a 13(c) agreement provided no protection for transit employees who did not have any collective bargaining rights. *United Transp. Union v. Brock*, 815 F.2d 1562, 1564-66 (D.C. Cir. 1987). Seven years before the public transit authority applied for federal assistance, the employees lost their collective bargaining rights for reasons wholly unrelated to the UMTA. *Id.* Because the employees lost their collective bargaining rights for a reason unrelated to UMTA, the Court found that there were no rights to be protected or continued under 13(c). *Id.* Therefore, both of these cases made clear that in order for the a 13(c) agreement to apply, the employee has to be a member of a union.

The petitioner never disputed at the district court level that he was not a member of the union. Consequently, the 13(c) agreement did not apply to him and the district court's decision to dismiss his contract claim was correct.

b. Even if petitioner was covered under 13(c), the 13(c) agreement would not have protected the petitioner from the 1997 RIF.

The petitioner argues that the 13(c) agreement protects all former NOPSI employees from **ever being laid off or terminated by TMSEL**. *See* Petition at p. 14. This is simply not the case. In fact, the language of the 13(c) agreement expressly provides for potential layoffs. On this point, at least, the petitioner does not misstate the lower court records, but remains ominously silent:

> Any employee in the bargaining unit represented by the Union who has been terminated or laid off for lack of work as a result of the Project shall be granted priority of employment or reemployment to fill any vacant position on the transit system for which he is, or by training or re-training can become qualified.

The record shows that petitioner made NO EFFORT to avail himself of any re-hire opportunities offered him in his layoff notification letter. Moreover, the 13(c) agreement specifically provides for what happens when TMSEL contemplates a change that will result in the displacement of employees:

> In the event the Company contemplates any change in its organization or operations which will result in the dismissal or displacement of employees, or rearrangement of the working forces represented by the Union as a result of the Project, the Company shall give reasonable written notice of such intended change to the Union.

Not only do these provisions from the 13(c) agreement directly contradict the petitioner's arguments, but the petitioner utterly failed to cite language in the 13(c)

agreement that supports his claim. Therefore, the petitioner was never – even as a union member – protected from potential layoffs by the 13(c) agreement.

c. Even if petitioner was covered under the 13(c) agreement, petitioner did not exhaust his administrative remedies under the 13(c) agreement.

Even if it is assumed that the petitioner was covered by the provisions of the 13(c) agreement, he failed to exhaust the administrative remedies afforded under the agreement. Paragraph 5 of the 13(c) agreement provides as follows: "The Company shall be financially responsible for the application of these conditions and will make the necessary arrangements with the Union to provide for mutually satisfactory claims handling procedure under this agreement." Because the petitioner did not exhaust his administrative remedies, his alleged 13(c) claim is without merit.

B. The District Court Did Not Err When It Dismissed Petitioner's Claims of Gender Discrimination.

In his second argument, the petitioner complains that his gender discrimination claim should not have been dismissed because: 1) he was laid off in the 1997 RIF, which resulted in a loss of benefits, and 2) that he was denied promotions back to safe harbor union positions.

1. Petitioner cannot show gender discrimination in the 1997 RIF.

The petitioner argues that the district court's decision should be overturned because it "ignored" uncontested

issues of fact when deciding petitioner's gender discrimination claim. The Petition fails to contradict the evidence that clearly proved that gender played no role in the 1997 RIF.

The Fifth Circuit in *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), articulated the *prima facie* elements to determine if the Age Discrimination in Employment Act (ADEA) was violated in a RIF: 1) the plaintiff was within the protected age group and he was adversely affected by defendant's employment decision; 2) the plaintiff must make a showing that he was qualified to assume another position at the time of discharge or demotion; and 3) the plaintiff must make some evidentiary showing from which the factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *Id.* at 129. The *Williams* Court did not place an affirmative duty upon an employer to accord special treatment to members of the protected group. *Id.* at 129-30.

If the same analysis is applied to petitioner's gender discrimination claim, he cannot prove a *prima facie* case. Title VII does not require that members of a certain gender group be protected from an adverse employment decision. If that were the standard, then every person who was discharged in March of 1997 would have a claim for gender discrimination – all of whom would be either men or women.

In fact, the uncontroverted evidence presented to the district court by TMSEL proves the opposite. In the March 31, 1997 RIF, some ***twenty* female** employees and **eight** other male employees were terminated at the same time. There is seemingly no evidence that shows that females were "favored" by the RIF. On the day petitioner was discharged, ***more than twice as many women than***

men were discharged in the RIF. As the trial court noted: if anything, males were treated preferentially in the RIF.

Moreover, petitioner's own deposition testimony shows that females were not treated favorably in the RIF. When petitioner was asked if there was a gender bias at the time of the RIF, his answer was undeniably "No":

> Q. Okay. Now, let me see if I can get this straight. Is your claim that there was unfair gender bias at work in the March of '97 when there was a reduction in force?
>
> A. No, sir. That's not what I'm saying.

Record 323.

The petitioner also testified that to the best of his knowledge, none of the females who had been laid off were subsequently rehired by TMSEL. Any suggestion that Bowie was strategically positioned to avoid the RIF because of her gender fails for two reasons: 1) there is no direct evidence of an intent on anyone's part at TMSEL to prefer Bowie over the petitioner because of her gender; and 2) any "indirect evidence" of discriminatory intent would have to be overshadowed by the undisputed statistical evidence which Magistrate Chasez relied on in finding that the RIF actually favored males.

The petitioner failed to produce any evidence demonstrating that petitioner's gender was a factor in his discharge. Petitioner does not show that significantly more men than women were discharged, he does not produce affidavits from other men who believe that their gender played a role in their discharge, and he cannot show that his gender had anything to do with his discharge.

The petitioner can only provide a laundry list of unsubstantiated facts, speculation, and innuendo to attempt to persuade this Court to grant his Petition. The

Petition states, "TMSEL does not dispute that Palmer was contractually entitled to preferences based on seniority." *See* Petition at p. 17. As stated earlier, TMSEL did indeed dispute the petitioner's contractual entitlement at the district court, and has argued earlier that petitioner is not entitled to any preferences based on any alleged contract.

The petitioner also argues that "TMSEL acknowledges that Bowie and Newman, two females with less seniority than Palmer, were transferred back to the Transportation Department." *See* Petition at p. 17. The record never establishes whether Bowie and Newman had less seniority than the petitioner. Accordingly, this fact is not in the record to support petitioner's argument.

Petitioner's "final and most important argument" in support of a reversal of the district court's decision was this: if petitioner would have been transferred back to a union position he would have been secure from the 1997 layoff, and Bowie and Newman were transferred back and were not laid off. *See* Petition at p. 18. There is no evidence in the record, however, that Bowie and Newman were transferred to union positions; there is no evidence in the record that Bowie and Newman were not laid off by TMSEL; and there is no evidence in the record that union employees were protected from layoffs. The entirety of petitioner's "last and most important" argument is built on speculation without corroborating evidence in the record.

Furthermore, there is the above cited testimonial evidence from the petitioner himself which states that gender did not play a role in his layoff. Significantly, in his Affidavit in Opposition to the Motion for Summary Judgment, petitioner failed to contradict or explain this deposition testimony. When the factual circumstances of record are reviewed in their totality, petitioner does not

have the grounds or the contradictory evidence to support a reversal of the district court's decision concerning his gender discrimination claim.

2. The district court made the correct analysis that Francis Bowie was transferred from the Maintenance Department to the Transportation Department at no change in salary.

Aside from the RIF that ended the petitioner's employment with TMSEL, the only thing approaching an actionable "adverse employment action" was what the petitioner has come to characterize as a discriminatory promotion of Francis Bowie. At the heart of his argument is the assertion that Frances Bowie's transfer was a "promotion" that carried a $2.00 per hour raise, which supposedly would elevate this action to an "adverse employment decision" under Title VII. The petitioner concluded that Bowie received a raise because TMSEL's Payroll Authorization, Control No. 106568 dated January 31, 1996, stated that her salary was $14.6829/hour, and TMSEL's Payroll Authorization Control No. 109357 dated August 8, 1997, stated that her salary was $16.6829/hour.

While it may appear that there is a discrepancy concerning Bowie's salary, the undisputed affidavit by Tamera Sylvain, TMSEL's Acting Director of Human Resources, established that the difference in the hourly rate between Control Numbers 106568 and 109357 was a typographical error. Furthermore, Sylvain's Affidavit was supported by undisputed payroll records which clearly showed that Bowie did not receive a pay raise in January or August of 1996 or at any other time. Bowie's salary remained at $14.6829/hour after her transfer, and she did not receive a raise as a result of her transfer. Consequently, the typographical mistake on form 106568 did

not constitute a "raise," and the transfer was not a "promotion."

Numerous actions commonly taken by employers are not considered adverse employment decisions for Title VII purposes. *See Burger v. Central Apartment Management, Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) ("Refusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision.") and *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999) ("We have held, along with many of our sister circuits, that employment actions are not adverse where pay, benefits, and level of responsibility remain the same.").

Therefore, given that Bowie was simply transferred and did not receive a pay raise, the district court properly dismissed this claim.

3. The petitioner's claim that TMSEL devised an elaborate conspiracy that ultimately led to his termination is frivolous and not accepted by either the Courts or the National Labor Relations Board ("NLRB").

Petitioner's allegation concerning the RIF is the final event in his litany of claims suggesting that TMSEL was "out to get him." The constant theme of his Petition is that in 1995 TMSEL "conspired" to move him out of a union position into a management position ultimately to fire him in 1997, along with twenty-eight other TMSEL employees. Petitioner's reason for this alleged conspiracy: TMSEL favored women over men. Petitioner's scattergun of claims leads to nothing more than that there was a "conspiracy" among Leroy Bailey, Eddie Moore, Jerome Beasley, Dale Newman and Francis Bowie, with all of them out to discriminate against him because of his gender, i.e., because he was a *man*.

However, the courts are "skeptical of such elaborate plot theories." *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 234 (7th Cir. 1992). In *Konowitz*, the plaintiff claimed that his promotion was the first step in his ultimate discharge that violated the Age Discrimination in Employment Act. *Id.* Nonetheless, the Seventh Circuit found this theory "imaginative at best;" the Court focused on the fact that the plaintiff was **promoted** in the company, which cut against the notion that the company harbored any ill-will or discriminatory intent towards the plaintiff. *Id.* Moreover, in *Palucki v. Sears, Roebuck & Co.*, the court affirmed summary judgment in favor of the employer where the plaintiff had argued that his promotion to division head, which entailed supervision of three departments, was a set-up to ensure his failure and facilitate his discharge. *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1570-71 (7th Cir. 1989). The Court called this an "*exceedingly* improbable plot." *Id.* at p. 1571.

Furthermore, the NLRB has recognized that employers have a fundamental right to assign employees to positions the employer deems, in the exercise of its managerial discretion, most expedient. Only if the NLRB finds proof that a particular transfer was made because the employee exercised rights guaranteed by the National Labor Relations Act will an employer's assignment be declared an unfair labor practice. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). It is well-established at the NLRB that the mere coincidence of an employee's union activity (or benefits) and his transfer will not support a charge of discrimination. *See Beaver Valley Canning Co. v. NLRB*, 332 F.2d 429 (8th Cir. 1964); and *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968).

The NLRB further allows an employer to promote an employee out of a bargaining unit and into a supervisory position unless "the bargaining unit thereby suffers a significant loss of work." *Lutheran Home of Kendallville, Ind.*, 264 NLRB 525, 525 n.2 (1982). Where an employer "wishes to select a unit employee to be a supervisor, and the unit will not lose that employee's work, the NLRB does not find that the employer has a duty to bargain over the selection." *Id.* An employer may have an obligation to bargain with a union **only if** it reduces bargaining unit work. *See St. Louis Tel. Employees Credit Union and Office and Prof'l Employees Int'l Union*, 273 NLRB 625 (1984). The petitioner has never alleged that the union's work was reduced because of his promotion, and the petitioner **never** filed an unfair labor practice charge.

In a desperate attempt to save his case, the petitioner claims that TMSEL conspired to single him out and move him to a managerial position as part of a grand scheme to deny him benefits and ultimately fire the petitioner years later as part of a RIF. The petitioner had absolutely no proof of this. The district court correctly dismissed the matter.

C. The District Court's Decision Dismissing Petitioner's Retaliatory Firing Claim Was Proper.

The petitioner argued that he experienced retaliation from TMSEL management after filing a grievance on October 13, 1995. The district court concluded that petitioner's EEOC charge did not address events that occurred prior to 1997, and that there was no evidence in the record that the EEOC investigated events that occurred as far back as 1995. Therefore, the district court determined that it lacked jurisdiction over his retaliation

claim based on the petitioner's failure to exhaust administrative remedies.

It is the apparent argument of the petitioner that the district court failed to take into account that his 1997 layoff "grew out of" his 1995 union grievance. However, the petitioner has not pointed to one piece of evidence to show that this occurred. In contrast, the record unequivocally proves that the petitioner's EEOC charge stated nothing about his 1995[5] grievance and that his 1995 grievance stated nothing about gender discrimination.

1. The district court is correct that the petitioner failed to file a retaliation claim with the EEOC.

The petitioner alleged that he was retaliated against for filing an internal grievance at TMSEL on October 13, 1995. The grievance addressed issues concerning seniority for scheduling shifts and failed to mention any gender inequity issues. On June 9, 1997, the petitioner filed EEOC Charge No. 270970922 concerning alleged acts of gender discrimination. The Charge of Discrimination, however, makes no specific mention of the grievance of October 13, 1995. The petitioner never filed an EEOC charge concerning the October 13, 1995 grievance.

The filing of an administrative complaint is a jurisdictional prerequisite to bringing suit under Title VII. Civil Rights Act of 1964, §701 *et seq., as amended by,* 42 U.S.C. §2000e *et seq.* The Court has ancillary jurisdiction to hear a claim of retaliation even if it is not filed with the

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[5] On p. 22 of the Petition there appears the incorrect statement that the petitioner filed an EEOC complaint in 1995. In 1995, the petitioner filed an internal administrative grievance – not with the union – at TMSEL.

EEOC, "when it grows out of an administrative charge that is properly before the court." *Barrow v. New Orleans Steamship Ass'n*, 932 F.2d 473 (5th Cir. 1991), (quoting *Gupta v. East Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981)). It is axiomatic that a plaintiff must exhaust available administrative remedies prior to filing suit under Title VII. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (citing *Ray v. Freeman*, 626 F.2d 439, 442 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981)). Courts hearing Title VII claims may consider only those specific claims set forth in a charge of discrimination in any way related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the charge. *Id.*; *Fine v. GAF Chemical Corporation*, 995 F.2d 576, 578 (5th Cir. 1993).

The petitioner's retaliation claim, however, did not "grow out" of the EEOC administrative charge. The administrative charge speaks for itself: it concerned alleged events that occurred only in 1997. There was no evidence that the EEOC investigation extended to events as far back as 1995. Since there was nothing in the record to prove otherwise, the district court held that it was constrained to determine that it lacked jurisdiction over the petitioner's retaliation claim. Therefore, because the petitioner could not point to a single piece of evidence showing that the EEOC investigation extended to incidents in 1995, the district court's decision was correct.

2. Even if it was assumed that petitioner had exhausted his administrative remedies available through the EEOC, the district court would have properly dismissed his retaliation claim on the merits.

In order for petitioner to establish a *prima facie* case of retaliation under Title VII, he must show that: 1) he was

engaged in an activity protected by Title VII; 2) an adverse employment decision occurred; and 3) there was a causal connection between participation in the protected activity and the adverse employment decision. *Jones v. Flagship Int'l*, 793 F.2d 714, 724 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

a. The petitioner cannot prove that he was engaged in an activity protected by Title VII.

The first element of a retaliation claim requires the petitioner to prove that he was engaged in an activity protected by Title VII. *Douglas v. Dyn McDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). The petitioner's grievance filed with the company on October 13, 1995 pertained to issues concerning the seniority among workers in the Maintenance Department. The filing of an internal grievance concerning seniority is not protected by Title VII. Thus, on its face, the petitioner's retaliation claim failed because the activity that he was engaged in was not one protected by Title VII.

b. The alleged acts of retaliation do not rise to the level of an ultimate employment decision.

In his deposition, the petitioner testified that TMSEL retaliated against him because TMSEL gave him different shifts, made false accusations, refused to pay sick time, and moved him to different departments in the area. Many actions commonly taken by employers are not considered "ultimate employment decisions" for Title VII

purposes. *See Dollis*, 77 F.3d at 782 (denials of administrative complaints and internal grievances were not ultimate employment decisions) and *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999) (changes in employee's work schedule, hours, and work load are administrative decisions that do not rise to the level of an ultimate employment decision under Title VII).

None of the actions complained of by the petitioner is an "ultimate employment decision." Because the petitioner could not prove the first two elements of a *prima facie* claim of retaliation, the district court's decision to dismiss this cause of action was correct.

E. The Trial Court Did Not Err in Dismissing Petitioner's Claims of Intentional Infliction of Emotional Distress Under Louisiana Law.

In Louisiana, in order for the petitioner to prevail on a claim for intentional infliction of emotional distress, the "conduct complained of must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Booth v. Intertrans Corp.*, No. 94-2359, 1995 U.S. Dist. LEXIS 7593 (E.D. La. 1995), (citing *Deus v. Allstate Insurance Co.*, 15 F.3d 506, 514 (5th Cir. 1994), quoting *White v. Monsanto*, 585 So. 2d 1205, 1209 (La. 1991)). Even if workplace conduct is calculated to cause some degree of mental anguish it will rarely be so severe as to rise to the level of "outrageous conduct." *Booth*, 1995 U.S. Dist. LEXIS at *14 (citing *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994)). Thus, ordinary employment disputes, even those that concern discrimination under Title VII, will only rise to the level of intentional infliction of

emotional distress in highly unusual cases. *Booth*, 1995 U.S. Dist. LEXIS at *14, (citing *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991); *Dean v. Ford Motor Co.*, 885 F.2d 300, 304-07 (5th Cir. 1989)).

Even if accepted as true, none of the conduct alleged by petitioner rises to the level of actionable discrimination, and it certainly does not rise to the level of "beyond all possible bounds of decency." The events that the petitioner complained of are nothing more than ordinary employment disputes that occur daily at every company. According to the petitioner's own testimony, he disagreed with the scheduling of shifts; supervisors were uncivil to him at times; he did not get the days off that he wanted; and he allegedly had to report to another employee whom he viewed as his subordinate. These kinds of disagreements between employers and employees happen constantly and cannot be considered "atrocious and utterly intolerable in a civilized community." *Id.* The district court agreed and determined that the petitioner failed to come forward with any credible summary judgment evidence of conduct that was "outrageous in character . . . [and] atrocious and utterly intolerable in a civilized community." *See* District Court Opinion at p. 18a.

The petitioner now urges that if he can prove his gender discrimination claim, he can prove his intentional infliction of emotional distress claim. But one claim should not be dependent on another claim. The petitioner had a fair opportunity to present facts to substantiate his intentional infliction of emotional distress. The facts are the facts. Whether the petitioner can prove his gender discrimination claim should have no bearing on his intentional infliction of emotional distress claim. For these reasons, the District Court's Opinion should be upheld.

F. The ERISA Claim Was Properly Dismissed Because the Petitioner Had Absolutely No Evidence Establishing That TMSEL Specifically Intended to Interfere With His Benefits.

Section 510 of ERISA prohibits an employer from interfering with an employee's right to attain or receive benefits under a pension plan. 29 U.S.C. §1140. A plaintiff who seeks recovery under §510 must present evidence establishing that the employer **specifically intended** to violate ERISA. An employer's specific intent to interfere under §510 is not established merely by proving that an employee suffered an incidental loss to benefits as a result of a termination, for a loss of benefits occurs each time an employee is discharged. Therefore, additional evidence is needed to establish that the employer intended to interfere with the employee's ERISA rights. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32 (1st Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996); *Dister v. The Continental Group*, 859 F.2d 1108 (2nd Cir. 1988); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514 (3rd Cir. 1997); *Henson v. Liggett Group, Inc.*, 61 F.3d 270 (4th Cir. 1995); *Clark v. Resistoflex Co.*, 854 F.2d 762 (5th Cir. 1988); *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994); and *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217 (11th Cir. 1993). **Significantly, the circuits are uniform on this issue.**

In the instant matter, the district court and the Fifth Circuit properly found no evidence in the record that TMSEL **specifically intended** to violate the petitioner's ERISA rights; rather, they determined that his ERISA rights were affected only as a consequence of his discharge. The petitioner's allegations rested solely on the suggestion that his termination as a result of a RIF occurred 18 months before his pension allegedly vested. But to "recover under section 510, the employee must show that the employer made a **conscious decision** to

interfere with the employee's attainment of pension eligibility or additional benefits." *Dewitt*, 106 F.3d at 23 (emphasis added). The petitioner never came forward with evidence establishing that TMSEL made a "conscious decision" to specifically deny him his ERISA rights. To the contrary, he was terminated as part of a RIF along with dozens of other employees.

In the same vein, in *Clark*, the Eleventh Circuit held that a plaintiff was required to show more than the fact that he was terminated as a result of a RIF to support his claim that his employer intentionally interfered with his ERISA rights. Because he could not do so, and because the workforce reduction was a legitimate attempt to cut costs, the court found that he failed to establish a *prima facie* case of a §510 violation. *Clark*, 990 F.2d at 1225. *See also Dister*, 859 F.2d at 1111 ("Plaintiff is required to prove more than the single fact that his termination precluded him from vesting into the . . . Plan; he must demonstrate [an] unlawful purpose in firing him").

Just as the plaintiff in *Clark* could not prove specific intent by merely claiming he was fired as part of a RIF, nor can the petitioner in the instant matter. Likewise, the fact the petitioner was terminated only 18 months before his pension allegedly vested (and there is *no record evidence* that any "vesting" was to occur) does not support his claim that TMSEL **specifically intended** to interfere with his ERISA rights. *See Dewitt*, 106 F.3d at 23. This evidence by itself was insufficient to create a factual dispute as to whether TMSEL had the specific intent to violate §510. As the record is devoid of any proof of specific intent as required under §510, the district court properly dismissed the matter.

CONCLUSION

This case is not "writ worthy." The petitioner has failed to show that the district court's determination is even arguably incorrect, much less in conflict with a decision of this Court, other Courts of Appeals, state courts, or federal law. To the contrary, the district court's decision is in full accord with controlling decisions of this Court and the Courts of Appeals. The petitioner has merely made factual arguments to this Court, arguments that the lower courts have already properly considered. Moreover, the petitioner, has raised new facts beyond the record for this Court to consider. For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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